IN THE SUPREME COURT OF

THE STATE OF NEW MEXICO

WEDNESDAY, SEPTEMBER 22, 1993

No. 21,508

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs .

CHRIS LUCERO,

Defendant-Petitioner.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is denied.

FURTHER ORDERED that the Record in Cause No. 14385 is returned to the Clerk of the Court of Appeals.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By _____
Chief Deputy

IN THE COURT OF APPEALS OF

THE STATE OF NEW MEXICO

STATE OF NEW MEXICO

Plaintiff-Appellee,

vs .

CHRIS LUCERO,

Defendant-Appellant.

APPEAL FROM

THE DISTRICT COURT OF CHAVES COUNTY

WILLIAM J. SCHNEDAR, District Judge

TOM UDALL, Attorney General
PATRICIA A. GANDERT,
Assistant Attorney General
Santa Fe, New Mexico
Attorneys for Plaintiff-Appellee

RAMON I. GARCIA
Roswell, New Mexico
Attorney for Defendant-Appellant

MEMORANDUM OPINION

PICKARD, Judge.

Defendant appeals his conviction of possession of fourteen ounces of marijuana with intent to distribute pursuant to NMSA 1978, Section 30-31-22 (Cum. Supp. 1991). Defendant raises three issues on appeal: (1) whether the trial court erred in denying Defendant's motion to suppress the evidence on the basis that the affidavit was facially invalid for failure to establish probable cause; (2) whether the information contained in the affidavit is stale because the affidavit states that a small amount of marijuana was seen at Defendant's residence seventy-two hours before the warrant was issued; and (3) whether failure to raise the issue of the "no knock rule" constitutes fundamental error.

Other issues raised in Defendant's docketing statement but not briefed are deemed abandoned. See State v. Fish, 102 N.M. 775,777, 701 P.2d 374, 376 (Ct. App.), cert. denied, 102 N.M. 734,

Appendix "B"

700 P.2d 197 (1985). We affirm.

PROBABLE CAUSE

Defendant contends that the affidavit is facially invalid because it failed to satisfy the veracity and basis of knowledge prongs of the probable cause test set forth in State v. Cordova, 109 N.M. 211, 213-14, 784 P.2d 30, 32-33 (1989). We disagree.

Search warrants based in whole or in part on unnamed informants must contain sufficient detail to allow the issuing magistrate to make an independent determination that probable

cause exists. Id. at 213, 784 P.2d at 32. The search warrant affidavit must therefore set forth a substantial basis for both believing the informant and concluding that the informant gathered the information of illegal activity in a reliable fashion. Id.; see SCRA 1986, S-211(E) (Repl. 1992).

Regarding the first prong of the test, on its face the affidavit sets forth the following bases for a determination that the informant can be believed: (1) on two prior occasions, information provided by the informant proved to be reliable and truthful; and (2) the informant was sufficiently reliable to have been entrusted by the police to make controlled buys of illegal drugs within six months of the affidavit. Therefore, the affidavit in this case is distinguishable from the affidavit in State v. Therrien,

110 N.M. 261, 794 P.2d 735 (Ct. App. 1990), overruled on other grounds by State v. Barker, 114 N.M. 589, 584, 844 P.2d 839, 844 (Ct. App. 1992), relied on by Defendant. In Therrien, the mere statement without any substantiating details by a police officer that the officer personally knew that the informant was reliable was insufficient to satisfy the veracity prong. Id. at 263, 794 P.2d at 737. As in Cordova, the informant in the instant case satisfied the veracity prong because the informant furnished information to the affiant that had proven to be true and correct on past occasions. See Cordova, 109 N.M. at 212, 784 P.2d at 31. In order to establish a record of veracity for the purpose of probable cause, it is not necessary, as Defendant suggests, for the informant's past tips to have led

to conviction. State v. Gutierrez, 91 N.M. 542, 547, 577 P.2d 440, 445 (Ct. App. 1978). On its face, there is sufficient information in the affidavit to support a determination that the confidential informant can be believed.

Regarding the second prong of the test, the affidavit contains the following information to support a conclusion that the informant's basis of knowledge is sufficient: (1) extensive, long-term dealings with marijuana that demonstrate the informant's familiarity with marijuana and his ability to identify it when seen; and (2) the informant's personal observation of a small amount of marijuana at Defendant's residence. Personal observation is sufficient to satisfy the basis of knowledge prong. State v. Ramirez, 95 N.M. 202, 204, 619 P.2d 1246, 1248 (Ct. App. 1980); see state

v. Cervantes, 92 N.M. 643, 647, 593 P.2d 478, 482 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979). On its face, there is sufficient information in the affidavit to support a determination that the informant had a sufficient basis of knowledge.

STALENESS

Defendant also asserts that the information in the affidavit regarding the presence of a small amount of marijuana at Defendant's residence seventy-two hours prior to the issuance of the warrant is stale and fails to establish probable cause that marijuana would still be found at Defendant's residence seventy-two hours later. Defendant contends that the information contained in the affidavit is insufficiently related to the time of the issuance of the warrant because the nature of the criminal activity

is merely an isolated transaction. See State v. Garcia, 90 N.M. 577, 578, 566 P.2d 426, 427 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977). Defendant further contends that other relevant factors such as (1) the smallness of the amount of marijuana observed by the informant, (2) a lack of information in the affidavit to indicate whether the person in possession of drugs is a resident of the premises, and (3) a lack of information regarding the prior history of the suspects combine to render the information in the affidavit stale. See State v. Scheer, 620 P.2d 973, 974-75 (or. Ct. App. 1980); State v. Kittredge, 585 P.2d 423, 424-25 (or. Ct. App. 1978).

Probable cause to authorize the issuance of a search warrant requires a factual showing that "an accused,

at the time of the application for warrant, is in possession of illegal property or the fruits of a crime or that evidence relating to the commission of a crime exists on the premises sought to be searched." State v. Donaldson, 100 N.M. 111, 115, 666 P.2d 1258, 1262 (Ct. App.), cert. denied, 100 N.M. 53, 665 P.2d 809 (1983). The degree of proof necessary to justify a search warrant supported by probable cause is "more than a suspicion or possibility but less than a certainty of proof." Id. at 116, 666 P.2d at 1263.

The relevance of the time factor depends on whether the alleged criminal activity indicates an isolated transaction or a continuing series of events. Garcia, 90 N.M. at 578, 566 P.2d at 427. Regarding the time factor, the Garcia Court also stated the following:

> "If there is a reasonable basis in the affidavit for the conclusion that the criminal activity alleged by the informer is of a continuing, ongoing nature, the passage of time between the informer's last observations of that activity and the issuance of the warrant is less significant than when no such showing is made in the affidavit."

Id. at 579, 566 P.2d at 428 (quoting State v. Austria, 524 P.2d 290, 294 (Haw. 1974)).

Under the circumstances of this case, the affidavit contains the following information to support a conclusion that Defendant, who was listed in the affidavit as residing at the address where the marijuana had been observed, was engaged in possession of illegal drugs on a continuing basis rather than just a single occurrence: (1) based on information from the New Mexico Department of Probation and Parole, Defendant had just completed

a probation period for possession of marijuana two months before issuance of the warrant; (2) based on information provided by officer Hill of the Roswell Police Department, Hill had arrested Defendant on prior occasions for possession of illegal drugs. See Garcia, 90 N.M. at 579, 566 P.2d at 428 (month-old information from informants regarding their personal observation of heroin on premises on separate occasions and statements regarding the defendant's personal heroin habit demonstrated criminal activity of a continuing and ongoing nature that was not stale for purpose of establishing probable cause). Nor are we persuaded by Defendant's argument that seventy-two hours is necessarily an extensive amount of time between a reliable informant's observation and the issuance of a warrant. The circumstances of the

instant case can be distinguished from those in State v. Powell, 96 N.M. 569, 632 P.2d 1207 (Ct. App. 1981), in which the only reliable information indicated-criminal drug activity that ended six months prior to the issuance of the warrant. See id. at 570-71, 632 P.2d at 1208-09.

Unlike the Oregon cases upon which Defendant relies, the affidavit in the instant case contains information that would indicate that the marijuana might still be on Defendant's premises at the time the warrant was issued. See Scheer, 620 P.2d at 974-75 (affidavit failed to establish probable cause when there were no distinguishing details to show why "a quantity of green vegetable substance" identified as marijuana would still be on the premises forty-eight hours later); Kittredge, 585 P.2d at 424-25 (evidence

was suppressed the affidavit failed to provide any details as to the amount of drugs observed, who occupied the premises that were searched, who possessed the marijuana, or any prior history regarding the suspects). The court in Kittredge acknowledged that the scales might have been tipped to uphold the affidavit had there been details specifying who resided at the premises being searched and details regarding a history of drug activity on the part of the suspects. Id. at 425; see State v. Scheidemann, 448 P.2d 358, 360 (or. 1968); State v. Black, 585 P.2d 44, 46 (or. Ct. App. 1978). In the case at hand, the affidavit contains information to reasonably support the following conclusions: (1) Defendant is engaged in the criminal activity of possession of drugs on an ongoing basis; (2)

Defendant resides at the premises to be searched; and (3) Defendant has a prior history of involvement with illegal drugs. Therefore, we determine that the information in the affidavit was not stale. Accordingly, we affirm the trial court's determination that the affidavit sufficiently complied with probable cause requirements.

FUNDAMENTAL ERROR

Defendant contends that it was fundamental error for his first trial attorney to fail to raise the "no knock rule" issue in the motion to suppress. Defendant further argues that it was fundamental error for the trial court to refuse Defendant's second trial attorney, who is also the counsel on appeal, an opportunity to raise the no knock issue during voir dire. We are not persuaded by either of Defendant's arguments.

Any failure by the first attorney to raise the no knock issue in the motion to suppress could have been cured by current counsel. Specifically, counsel could have requested the trial court to suppress the evidence on this basis. Counsel cites to no such efforts to invoke a ruling of the trial court. In addition, counsel admits that his only attempt to raise this issue at the trial level was made during voir dire, even though he was alerted to the possible relevance of this issue prior to trial.

There is no factual basis to support Defendant's allegation that the trial court would not allow the no knock issue to be raised. The trial court merely prevented counsel from raising the issue during the inappropriate time of voir dire for what was, in all likelihood, an inappropriate purpose.

See State v. Sheetz, 113 N.M. 324, 327, 825 P.2d 614, 617 (Ct. App. 1991) (proper standard of police conduct is a question of law and policy to be decided by courts). In order to preserve an issue for review on appeal, it must appear that the appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court. Woolwine v. Furr's Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). Failure to make a specific argument results in a failure to preserve the issue for appellate review. State v. Goss, 111 N.M. 530, 532-33, 807 P.2d 228, 230-31 (Ct. App.), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991). Accordingly, we determine that Defendant failed to preserve this issue for appeal.

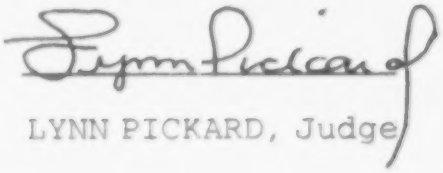
In its discretion, an appellate court may review an issue raised for

the first time on appeal if it involves fundamental error. SCRA 1986, 12-216 (B) (2) (Repl. 1992). However, in the instant case there are no facts in evidence upon which this Court can evaluate the merits of a fundamental error claim. The only information in the record regarding the no knock issue consists of comments made by counsel during voir dire. Arguments of counsel, unsupported by evidence, do not constitute evidence. State v. Wynne, 108 N.M. 134, 136, 767 P.2d 373, 375 (Ct. App. 1988), cert. denied, 108 N.M. 115, 767 P.2d 354 (1989). Nor can this Court speculate as to matters outside the record. State v. Henderson, 81 N.M. 270, 271-72, 466 P.2d 116, 117-18 (Ct. App. 1970). Due to the total absence of any factual basis in the record upon which to evaluate the no knock issue, we are

unable to decide the merits of this issue.

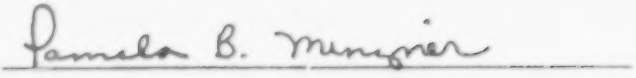
For the reasons stated above, we affirm.

IT IS SO ORDERED.

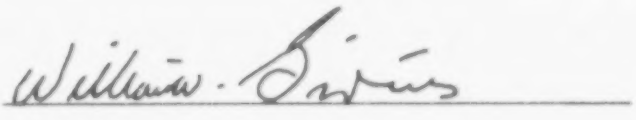


LYNN PICKARD, Judge

WE CONCUR:



PAMELA B. MINZNER, Chief Judge



WILLIAM W. BIVINS, Judge

IN THE DISTRICT COURT OF CHAVES COUNTY

STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff,

vs .

CR-92-103

CHRIS LUCERO,

Defendant.

ORDER DENYING MOTION TO SUPPRESS

The Defendant's Motion to Suppress came on for hearing on the 15th of June 1992. Based upon review of the Affidavit for Search Warrant and the memoranda furnished to the Court, the Court finds:

1. The time period set out in the affidavit - within the past 72 hours- does not render the information stale;

2. There is sufficient information in the Affidavit regarding the reliability of the informant that a neutral magistrate could properly find that the information furnishes probable cause for the issuanee of a search warrant.

Accordingly, the Court concludes that there was probable cause for the

issuance of the Search Warrant in this case, and the Motion to Suppress is denied.

/s/ W. J. Schnedar
William J. Schnedar
District Judge

Submitted by:

VERNON O.M. HENNING
SENIOR TRIAL PROSECUTOR

Noted:

MONICA MUNOZ
ASSISTANT PUBLIC DEFENDER